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Maintenance

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Chapter 5

Maintenance

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The modern consensus is that alimony, also referred to as 'maintenance' or 'spousal support,' should be awarded at the dissolution of a long marriage when the parties would otherwise have very different living standards. But consensus stops there. To what extent should post-divorce living standards be equalized? How long should an award continue? In 1979, the U.S. Supreme Court held that maintaining the 'traditional family relationship,' e.g., breadwinner/homemaker stereotypes, is *not* a legitimate goal. *Orr v. Orr*, 440 U.S. 268 (1979). If maintenance isn't based on gender roles, or limited to fault cases, how can it be justified?

Historically, it was the husband's duty to support his wife. If they were no longer married— because he had abandoned her, committed adultery, or otherwise behaved badly— he was still responsible for her support. The husband would not be allowed to benefit from his own misconduct. If the *wife* had behaved badly, however, she was not entitled to any support. While some jurisdictions focused more on women's financial dependency, alimony was only awarded to 'innocent' wives. The point of alimony was to provide for virtuous wives who would otherwise have no income, since it was also assumed that women would not work outside the home.

The rationales for maintenance were undermined by no-fault divorce, which made spousal misconduct less important, if not irrelevant, and by the growing rejection of gender roles. But many wives were still financially dependent. The early focus was on transitional support. In long term marriages, courts typically focus on 'need.' The standard, however, remains unclear. Some cases refer to the standard of living during marriage, although it is obvious that two households cannot be maintained at the pre-divorce level unless there is more income. It is also clear, however, that lower-earning custodial parents — usually mothers — often suffer a disproportionate drop in their standard of living after divorce.

Part A of this chapter sets out the section of the statute applicable to temporary maintenance, to be awarded to the less monied spouse while the case is pending. Part B sets out the standard for post-divorce maintenance, which may be permanent or temporary. Part C sets out pertinent excerpts from the New York State Law Revision Commission Final Report, explicitly called for by the legislature in the Temporary Maintenance Statute, which addresses both temporary and post-divorce maintenance, but which has not been adopted by the legislature. Part C concludes with the response of the American Academy of Matrimonial Law (AAML) to the American Law Institute (ALI) Principles on compensatory payments.

A. Temporary Maintenance

N.Y. Dom. Rel. Law § 236 sets out provisions applicable in actions for annulment, separation or divorce. Part A applies to actions begun before July 19, 1980, and Part B applies to actions begun after that date. In late June, 2015, the N.Y. State Assembly passed a bill preserving the temporary maintenance guidelines and extending them to post-divorce maintenance. The formula will only apply to income up to $175,000. In addition, the proposed bill suggests ranges for the duration of maintenance awards and for adjustments if child support is involved. The bill was under review by the governor's office as we go to press.

N.Y. Dom. Rel. Law § 236 Part A

(McKinney 2014)

> 2. Compulsory financial disclosure. In all matrimonial actions and proceedings commenced on or after [September 1, 1975] in supreme court in which alimony, maintenance or support is in issue and all support proceedings in family court, there shall be compulsory disclosure by both parties of their respective financial states.... A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof. In the event said statement is not demanded, it shall be filed by each party, within ten days after joinder of issue, in the court in which the procedure is pending. As used in this section, the term net worth shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations. It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter....

While Part A is decreasingly important as 1980 recedes, cases still come up, as shown below.

Roseanne P. v. Gustav P.

981 N.Y.S.2d 638 (Sup. Ct., Westchester Cnty. 2013)

* * *

The parties were married on October 28, 1972 in New York State and there was one child of the marriage. The parties were divorced pursuant to a Judgment of Divorce, filed May 8, 1981 ("Judgment of Divorce").

Pursuant to the Judgment of Divorce, Defendant was required to pay alimony to Plaintiff in the amount of $75.00 per week.

On October 23, 2000, Plaintiff filed an order to show cause against Defendant seeking to enforce the terms of the Judgment of Divorce requiring payment of child support and alimony and counsel fees. The parties settled the matter by entering into a "So Ordered" Stipulation, dated January 25, 2001 ("January 2001 Order"), in which the parties entered into an agreement pertaining to claims for child support and alimony arrears, requiring Defendant to pay a total sum of $35,000.00 in full satisfaction of

Plaintiff's claim.... Pursuant to the January 2001 Order, the parties also agreed to modify Defendant's weekly obligation to pay $75.00 per week, so that, effective June 30, 2001, Defendant was required to make an annual payment of $3,900.00 to Plaintiff on that date and every anniversary of that date thereafter.

* * *

CONCLUSIONS OF LAW

A. A Twenty Year Statute of Limitations Applies

Contrary to Defendant's assertion, Plaintiff is not barred from seeking enforcement of Defendant's payment obligation that is set forth in the January 2001 Order. The time frame for Plaintiff's action for enforcement of the terms of the January 2001 Order is governed by CPLR § 211, "Actions to be commenced within twenty years," as amended on August 8, 1987, which provides, in relevant part, as follows:

> (e) For support, alimony or maintenance. An action or proceeding to enforce any ... order ... must be commenced within twenty years from the date of a default in payment. This section shall only apply to orders which have been entered subsequent to the date upon which this section shall become effective.

Here, although the Judgment of Divorce preceded this statutory amendment, the January 2001 Order did not. As there can be no real dispute that the January 2001 Order was entered after the enactment of this CPLR provision, the twenty year statute of limitations period applies. As Plaintiff's enforcement action is well within that twenty year period, Defendant's application to dismiss Plaintiff's claims on this ground is denied.

B. Plaintiff is not Barred from Seeking Alimony from 2007–2012

To preclude a claim on the ground of laches, there must be a showing not only of a delay, but also an injury, change of position or other disadvantage resulting from such delay....

Here, although Plaintiff does not dispute that in 2007 Defendant sent her a letter advising her that he could not pay alimony, Defendant has not alleged any prejudice or injury as a result of Plaintiff's failure to respond or to make a demand for payment until the filing of this action. Mere inaction or delay in bringing a proceeding, without a showing of prejudice, does not constitute laches....

———

Part B, which applies to actions initiated after July 19, 1980, begins by distinguishing between 'maintenance,' or support, and 'distributive awards,' which refer to the transfer of property from one spouse to the other as part of their division of marital property. The first may be modified, but the latter is final.

N.Y. Dom. Rel. Law § 236 Part B

(McKinney 2014)

* * *

> a. The term "maintenance" shall mean payments provided for in a valid agreement between the parties or awarded by the court ... to be paid at fixed

> intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification. . . .
>
> b. The term "distributive award" shall mean payments provided for in a valid agreement between the parties or awarded by the court, in lieu of or to supplement, facilitate or effectuate the division or distribution of property. . . payable either in a lump sum or over a period of time in fixed amounts. Distributive awards shall not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code.

N.Y. Dom. Rel. Law § 263 Part B further provides that in actions brought after July 19, 1980, plaintiff shall serve the defendant, along with the summons, a copy of 'automatic orders.' These orders are binding upon plaintiff upon filing, and upon defendant upon service. They are detailed, comprehensive and, absent court order, remain in full force and effect until the action is concluded. Their objective is to maintain the status quo, as indicated in the following:

> b. (1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

Additional paragraphs impose the same rigorous restrictions on retirement and pension accounts, credit cards and cash advances, and insurance policies.

Part B also established a formula for temporary maintenance, effective October 13, 2010:

> 5-a. Temporary maintenance awards. a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court shall make its award for temporary maintenance pursuant to the provisions of this subdivision.
>
> b. For purposes of this subdivision, the following definitions shall be used:
>
> (1) "Payor" shall mean the spouse with the higher income.
>
> (2) "Payee" shall mean the spouse with the lower income.
>
> (3) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of action.
>
> * * *
>
> c. The court shall determine the guideline amount of temporary maintenance in accordance with the provisions of this paragraph after determining the income of the parties:
>
> (1) Where the payor's income is up to and including the income cap:
> (a) the court shall subtract twenty percent of the income of the payee from thirty percent of the income up to the income cap of the payor.

(b) the court shall then multiply the sum of the payor's income up to and including the income cap and all of the payee's income by forty percent.

(c) the court shall subtract the income of the payee from the amount derived from clause (b) of this subparagraph.

(d) the guideline amount of temporary maintenance shall be the lower of the amounts determined by clauses (a) and (c) of this subparagraph; if the amount determined by clause (c) of this subparagraph is less than or equal to zero, the guideline amount shall be zero dollars.

This can be expressed as a simple formula:

30% of Payor's income	or	40% of their combined incomes
-20% of Payee's income		-Payee's income

The lower amount of the two calculations is the guideline amount. For example, assume that the Payor's income is $90,000 and the Payee's income is $40,000:

30% payor's income =	$27,000	40% x $130,000 (combined income) =	$52,000
20% payee's income =	-8,000	payee's income	-40,000
	$19,000		**$12,000**

The lower amount, $12,000, is the **guideline amount** for temporary maintenance.

The statute further sets an income cap; that is, an upper limit to which the formula applies. This is adjusted periodically. The income cap as of March 2014 was $543,000. (The income cap for child support, in contrast, is $136,000. *See* Chapter 8.) If the income of the payor exceeds the income cap, the court shall determine the guideline amount of temporary maintenance for that portion of the payor's income that is up to the income cap according to the formula. Any additional temporary maintenance shall be determined by considering the following factors in Part B:

2(a)(i) the length of the marriage;

(ii) the substantial differences in the incomes of the parties;

(iii) the standard of living of the parties established during the marriage;

(iv) the age and health of the parties;

(v) the present and future earning capacity of the parties;

(vi) the need of one party to incur education or training expenses;

(vii) the wasteful dissipation of marital property;

(viii) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(ix) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(x) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful

> employment. Such acts include but are not limited to acts of domestic violence. . . .
>
> (xi) the availability and cost of medical insurance for the parties;
>
> (xii) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;
>
> (xiii) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
>
> (xiv) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;
>
> (xv) the tax consequences to each party;
>
> (xvi) marital property subject to distribution pursuant to subdivision five of this part;
>
> (xvii) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;
>
> (xviii) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
>
> (xix) any other factor which the court shall expressly find to be just and proper.

The statute requires the court to explicitly "set forth the factors it considered and the reasons for its decision. Such written order may not be waived by either party or counsel." The enactment of the temporary maintenance formula set out above was controversial, especially with respect to the income cap, as set out in the Final Report, excerpted in Part C.

The guidelines recognize that the payor, too, has expenses and allows him or her to keep enough income to subsist. Where the guideline amount of temporary maintenance would reduce the payor's income below the 'self-support reserve;' set for a single person at $15,755 as of March, 2014; temporary maintenance is the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance should be awarded.

In order to deviate from the guidelines, the court must find that the presumptive award of temporary maintenance is "unjust or inappropriate" and "set forth, in a written order, the amount of the unadjusted presumptive award of temporary maintenance, the factors it considered, and the reasons that the court adjusted the presumptive award of temporary maintenance. Such written order shall not be waived by either party or counsel."

The Temporary Maintenance Statute was enacted on the same day as the New York No-Fault Statute. See Chapter 4. Opponents of no-fault included women's advocates, who feared that no-fault would leave homemakers with little leverage, as set out in the following article.

Nancy E. Gianakos, The Devolution of the Homemaker; It's Time for Legislative Redress

The Nassau Lawyer, Oct. 2008

… A case in point is the recent decision in *J.S. v. J.S.*, (857 N.Y.S.2d 427 [Sup. Ct., Nassau Cnty. 2008]). The Court, at the commencement of the action, was faced with a soon to be retiring husband (age 58) and his 57-year-old homemaker wife. Cognizant of the limited retirement assets for distribution, and the husband's imminent retirement at age 65, the court, in a case of first impression, considered the future economic reality of the payor's earning potential post-divorce as well as, his work life expectancy in determining a non-durational award of maintenance.

In essence, the court acknowledged that people are living well into their 80s or 90s. In awarding non-durational maintenance, the court reasoned, that not only must consideration be given to the statutory factors effecting the wife's ability to be self-supportive such as, her age, health, education, skills and work history as well as the length of the marriage, but also whether the payor spouse will have assets from which to pay support obligations post-retirement.

Recognizing the wife as incapable of becoming self-supportive, the court, nevertheless refused "enslaving the historic wage earner to indefinite years of employment beyond any reasonable expected retirement." The court imputed income to the wife of approximately $20,000 per year notwithstanding her claims of disability that were unsubstantiated at trial and imputed income of $110,000 to husband based upon his ability to earn. Looking to national vital statistics averages, the court noted husband has a life expectancy of 20 years, and work life of approximately 4 years; the wife, had a life expectancy of 24 years, and work life of 3 years. Given the limited retirement assets and savings, the court determined the husband had no choice but to work beyond age 65 to age 70 and wife, for the same reasons, must work to age 70. The wife, ending a 38-year marriage, was ultimately awarded maintenance for a duration not to exceed 10 years.

Is there now judicial precedent for termination of maintenance based upon the payor retiring, and if so, at what age? The economic survival of the dependent homemaker hangs in the balance. No doubt, amending the Domestic Relations Law to alleviate domestic strife and family acrimony for divorcing litigants through no fault legislation is long overdue. But in efforts to relieve marital acrimony, the legislature must not overshoot the target. For 28 years, the financial erosion of the homemaker has gone unaddressed. If ever the time for legislative redress of the homemaker's economic grievances was needed, it's now.

The Temporary Maintenance Statute concludes with a statement of policy and a call for further study:

N.Y. Dom. Rel. Law § 236 Part B

(McKinney 2014)

> 6-a. Law revision commission study. a. The legislature hereby finds and declares it to be the policy of the state that it is necessary to achieve equitable outcomes when families divorce and it is important to ensure that the economic consequences of a divorce are fairly shared by divorcing couples. Serious concerns have been raised that the implementation of New York state's maintenance laws have not resulted in equitable results. Maintenance is often not granted and where it is granted, the results are inconsistent and unpredictable. This raises serious concerns about the ability of our current maintenance laws to achieve equitable and fair outcomes.
>
> The legislature further finds a comprehensive review of the provisions of our state's maintenance laws should be undertaken. It has been thirty years since the legislature significantly reformed our state's divorce laws by enacting equitable distribution of marital property and introduced the concept of maintenance to replace alimony. Concerns that the implementation of our maintenance laws have not resulted in equitable results compel the need for a review of these laws.

Tadesse v. Amanu

985 N.Y.S.2d 133 (App. Div. 2014)

In an action for a divorce and ancillary relief, the defendant appeals from so much an order of the Supreme Court, Queens County dated February 15, 2013, as granted those branches of the plaintiff's motion which were for pendente lite relief to the extent of directing him to pay temporary maintenance in the sum of $1,150 per month and interim counsel fees in the sum of $5,000.

Ordered that the order is affirmed insofar as appealed from, with costs.

"Modifications of pendente lite awards should rarely be made by an appellate court and then only under exigent circumstances, such as when a party cannot meet his or her financial obligations". "[A]ny perceived inequities in the pendente lite order can best be remedied by a speedy trial, at which the parties' financial circumstances can be thoroughly explored". Here, the defendant demonstrated no basis upon which to modify the award of temporary maintenance to the plaintiff.

Furthermore, "[a]n award of [interim] counsel fees pursuant to Domestic Relations Law § 237(a) is a matter within the sound discretion of the trial court, and the issue 'is controlled by the equities and circumstances of each particular case.' " Considering the financial circumstances of both parties and the circumstances of this case, the Supreme Court providently exercised its discretion in granting that branch of the plaintiff's motion which was for an award of interim counsel fees in the sum of $5,000.

Dachille v. Dachille

983 N.Y.S.2d 193 (Sup. Ct., Monroe Cnty. 2014)

* * *

Maintenance

Plaintiff here seeks maintenance from defendant. Plaintiff receives $2,004 per month ($24,048 annually) in social security disability benefits, $2,973 per month in veteran's disability benefits ($35,676 annually), and a Postal Workers pension of $436.18 monthly ($5,234 annually). That is $5,413.18 per month or $64,958.16 per year. Defendant earned $64,110 in 2012 from her job as supervisor with the United States Postal Service, together with a modest amount of deferred income.

* * *

There is no need here to perform any calculations. The temporary maintenance guidelines, by design, "only result in an award when there is an income gap between the two parties such that the less-monied spouse's income is less than two thirds of the more monied spouse's income." Assembly Introducer Mem. in Support, Bill Jacket, L. 2010, ch. 371, at 14.

* * *

Even if the court did not consider such income to plaintiff for purposes of the temporary guideline calculation, it would find any resulting guideline award to plaintiff unjust and inappropriate. Section 236(B)(5–a)(e)(1) provides that "[t]he court shall order the presumptive award of temporary maintenance in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is unjust or inappropriate and adjusts the presumptive award based upon consideration of the" factors enumerated therein. Notably, plaintiff has maintained a pre-divorce separate household for more than three years prior to the commencement of this action. DRL §236(B)(5–a)(e)(1)(g). Plaintiff further has not presented any argument that he is in need of support or that he is now living below the marital standard of living. N.Y. Dom. Rel. Law §236(B)(5–a)(e)(1)(a). Plaintiff's application fails to address how he could afford to pay the mortgage and make the Chapter 13 payments from June 2010 through August 2012, $3,554 ($1,534 + $2,020), and then beginning August 29, 2012, only $2,534 (the mortgage plus the $1000 per month note to the cousin, replacing the Chapter 13 plan), and beginning June of 2013, just the note at $1000, but now requires temporary spousal support.

Rather, according to plaintiff, "[t]his motion has been necessitated by Defendant's unwarranted threats of Temporary Maintenance Motion through her attorney, which are groundless and borderline frivolous." Plaintiff's Affidavit, ¶4. By "unwarranted threats" plaintiff refers to a letter from defendant's counsel which requests that plaintiff resume paying the mortgage on the marital residence as he did until June 2013. The letter provides that a settlement offer is forthcoming but that the house should be listed for sale and that plaintiff should resume making the mortgage payments as he did from June 2010 through June 2013. If there could be no agreement to list the house or to resume the mortgage payments, a motion would be brought. The court does not consider this an unwarranted threat as it merely sought to restore the status quo.

Plaintiff's application for temporary maintenance is denied. Further, the court denies plaintiff's application that defendant contribute $500 per month toward the note to the cousin. The debt of the parties shall be distributed at the time of judgment. The court has no power to distribute this debt prior to final judgment without agreement of the parties.

Similarly, the court orders plaintiff to bring current and pay the mortgage on the marital residence as both parties intend to sell the residence. The court will apportion any proceeds or debt considering all the facts and circumstances as presented here and developed at trial.

Exclusive Use and Residency

"Courts are statutorily empowered to grant one spouse temporary exclusive use and occupancy of the marital residence during the pendency of divorce proceedings. … Exclusive occupancy of a marital residence by one party, pendente lite, is warranted only: (1) when needed to protect the safety of persons or property; or (2) when the nonmovant spouse has voluntarily established an alternative residence and that spouse's return to the marital residence would cause domestic strife."

Although it appears plaintiff vacated the marital residence voluntarily, there are insufficient allegations that his return would engender strife. In fact, it appears that plaintiff has no intention of returning to the marital residence. "An award of exclusive occupancy must be based upon incidents that exceed petty harassments such as the hostility and contempt admittedly demonstrated herein that are routinely part and parcel of an action for divorce."

Finally, there are no allegations here that plaintiff is a danger to defendant. Exclusive use and occupancy is denied.

As to the parties' applications for interim counsel fees, N.Y. Dom. Rel. Law § 237(a) provides a presumption that the monied spouse pay interim counsel fees to ensure that each side is adequately represented. As the statute provides, "[a]n award of an attorney's fee … is a matter within the sound discretion of the trial court, and the issue is controlled by the equities and circumstances of each particular case." In addition, that "[a]n award of interim counsel fees is designed to create parity in divorce litigation by preventing a monied spouse from wearing down a nonmonied spouse on the basis of sheer financial strength". There is substantial parity here between the parties' incomes and the court does not perceive that either party has an advantage over the other "on the basis of sheer financial strength."

Notes and Questions

1. *The Response.* The response to the Temporary Maintenance Statute was mixed. As, set out in the Report of the The New York State Law Revision Commission, no "statistically significant conclusions could be derived from over 7,000 questionnaires." Some aspects of the new law, however, were particularly contentious. *See, e.g.*, Sophia Hollander, *Divorce Law's New Cut — Changes Meant to Protect the Poor Are Mandating Bigger Alimony*

Payouts, WSJ.com. (March 12, 2012, 5:33 PM), http://www.wsj.com/articles/SB10001424052970204603004577271821665524012:

> It is "just pure redistribution of wealth brought down to the family level," said Timothy Tippins, a former president of the New York state chapter of the American Academy of Matrimonial Lawyers and now an adjunct professor at Albany Law School. "They've dropped any pretense of predicating the award on the actual needs or circumstances of the parties."

2. *Low Income Wives.* Some lawyers said that the new law was a real boon for low-income women. *See, e.g.*, Joel Stashenko, *Divorce Cases Are Complicated By New Maintenance Rules,* N.Y. L.J., Oct. 12, 2011. According to Emily Rubin, the co-supervising attorney of the family law and domestic violence practice at the Legal Aid Society of New York City, low-income women often fled marriages without seeking interim maintenance payments, especially if they were in abusive relationships or not represented by a lawyer. The formula assures them desperately-needed support: "It has dramatically helped our clients. They are getting much fairer awards, much more quickly. Is it harder for the payor spouse to pay these awards? Absolutely. But the single father, generally, still has more income, just not as much more."

Problem 5-1

Miranda and Pete have been married for four years. Miranda is a lawyer and her annual salary is $170,000. Pete is a bartender. He earned $80,000 per year when he was working full time, but he cut his hours when their son was born two years ago and he now earns $30,000 per year. Pete has come to see you because Miranda has told him that she has fallen in love with another lawyer, a woman at her firm, and she will be moving in with her at the end of the month. Pete tells you that he needs support now, and he expects to need support at least until their son graduates from high school. Miranda has told him that she will be happy to pay child support but that she has no intention of supporting him.

Can you get temporary maintenance for Pete? What problems, if any, do you anticipate?

B. Post-Divorce Maintenance

As noted at page 108, the N.Y. Assembly has passed a bill subjecting some post-divorce maintenance awards to the same formula as temporary awards. As we go to press, this bill is being reviewed by the Governor. Other awards are subject to the same criteria set out in (2)(a), *supra,* adding "the ability of the party seeking maintenance to become self-supporting" as a factor.

Guy v. Guy

987 N.Y.S.2d 751 (App. Div. 2014)

Defendant husband appeals from a judgment of divorce that, insofar as appealed from, confirmed in relevant part the report of the Matrimonial Referee (Referee) appointed to hear and report with respect to the issues of maintenance and equitable

distribution. In the judgment, Supreme Court ordered that neither party shall pay spousal maintenance to the other and equitably distributed the marital debt. Contrary to defendant's contention, the court did not abuse its discretion in failing to award him maintenance. The Referee properly considered the factors set forth in Domestic Relations Law §236(B)(6) in determining that an award of maintenance to defendant was not warranted. Although plaintiff earns more than defendant and although defendant pays child support, neither fact, by itself or in combination with the other, requires the court to award maintenance to defendant.

Twila L. Perry, Alimony: Race, Privilege, and Dependency in the Search for Theory

82 Geo. L.J. 2481, 2483–84; 2519–20 (1994)

* * *

Statistics indicate that Black women are awarded alimony at a significantly lower rate than white women. In 1987, over eighteen percent of currently divorced or separated white women had been awarded alimony at the time of their divorces, while less than eight percent of Black women had received such an award. It also appears that women in higher income marriages are more likely to receive alimony than women in lower income marriages. In light of this data, it is important that we examine the implications of women scholars devoting substantial attention to an issue that is of practical importance to relatively few women, and especially so few women of color. What are the implications for women of color and other poor women of this search for a theory of alimony? Does it serve to reinforce the differences between women of different classes and races? Or are there ways in which a discourse that seems relevant only to privileged women can be helpful to the struggles of a wider range of women in whose lives gender, race, and class oppression are often experienced simultaneously? Can efforts aimed at developing a theory of alimony both enrich and draw upon other scholarly work directed toward improving the conditions of subordinated groups?

This article will begin by briefly describing the marriage paradigm that has, to a great extent, shaped the discourse on developing a theory of alimony. I will demonstrate that this paradigm has little relevance to the realities faced by most poor women of color and that, accordingly, most of the approaches to alimony based on it have little practical relevance to the lives of these women. I define the issue, however, as more than one of mere irrelevance or exclusion. I argue that the search to develop a theory of alimony may have serious negative implications for poor women of color, especially Black women. Specifically, the paradigmatic model of marriage and divorce has the potential to reinforce the subordination and marginalization of Black women in two ways: first, by reinforcing privilege or an image of privilege for middle and upper-middle class white women in both marriage and divorce, and second, by reinforcing a hierarchy among women in which their value is determined by the presence or absence of legal ties to men, particularly affluent men.

This article will suggest the need to develop, not simply a theory of alimony, but a feminist approach to alimony that examines that institution in the context of broader issues affecting the lives of a diverse group of women. I will argue that a feminist theory

of alimony must examine alimony, not as a single issue, but as part of a larger inquiry involving issues of work and family in women's lives. In so doing, it must address questions of patriarchy, dependency, and economic justice for women who care for the children and homes of other women while they work outside the home. Although I will not propose a specific theory that encompasses all of these concerns, I will suggest some of the questions we will need to ask in order to begin that undertaking.

* * *

The development of a theory of alimony is an important enterprise. It is important to protect the economic interests of women who have foregone career opportunities in favor of family responsibilities, especially because, at least to some extent, society still encourages women to play the role of homemaker.

Feminists must, however, recognize that the search for a theory of alimony also reinforces privilege—or at least the image of privilege—in a group that is predominately white and middle or upper-middle class, in a world where women of color and other poor women often live lives of economic desperation. To the extent that alimony reinforces the subordination of poor and minority women, it fuels a divisiveness that undermines and weakens the women's movement. Feminists must also recognize that to the extent women are protected when they play the role of full-time homemaker they will continue to see it as a viable option. The result is continued economic dependence on men. A feminist theory of alimony must address the economic and psychological dependency of women on men and must confront, head on, the implications of patriarchy.

Feminists should continue to think hard about alimony. We should question its wisdom even as we continue to justify it. The ultimate struggle, however, should be to analyze alimony as part of a more comprehensive feminist project dealing with work and family life that explores and honestly confronts both the common and different interests of women of different classes, races, and sexual orientations. This is not an easy task; it may be awkward and uncomfortable. But it is a job that must be done.

J. Thomas Oldham, Changes in the Economic Consequences of Divorces, 1958–2008

42 Fam. L.Q. 419, 431–34 (2008)

* * *

4. Trends in the Awards of Alimony and Spousal Maintenance

During the past half century, legislators and judges have noticed the increased participation in the labor force by women, as well as the reduction in the male-female "wage gap." In addition, because of the increases in the divorce rate, it is increasingly clear that marriage is much less than a lifetime commitment for many. Although there has never been complete agreement in the United States about the purpose of post-divorce spousal support, these recent societal changes have muddled the dialogue even further.

Some commentators expressed hope that, with the enactment of equitable distribution and increased labor force participation by women, any financial needs of a dependent spouse at divorce could increasingly be satisfied via child support and a division of the parties' property. After such a "clean financial break," it was thought that spousal support

could become a less important part of the economic consequences of divorce. Indeed, a number of empirical studies from the late 1960s through the 1980s confirm the trend of less frequent awards of spousal support, as well as a growing tendency toward support for a fixed term, as opposed to support for an indefinite period. Professor Marsha Garrison found a substantial reduction in the frequency of alimony awards even in marriages that lasted twenty years or more before divorce. She found that, in divorces involving marriages of at least ten years of duration, the frequency of alimony was significantly impacted by whether the wife worked outside the home. All researchers agree that in those instances where spousal support is ordered, the goal is generally not to equalize the income in the two post-divorce households, even in marriages of long duration.

During the past two decades, it appears that in a number of states there has been a reevaluation of whether fixed-term alimony is appropriate when couples divorce with substantially different incomes after a long marriage. There appears to be a greater willingness to award indefinite term alimony when parties are divorcing after a marriage of long duration, the parties' incomes are quite different, and the recipients cannot realistically be retrained.

Although many spousal support statutes give a court great discretion regarding the decision to award postdivorce spousal support, a few impose significant restrictions. In Texas, spousal support generally is not available if the duration of the marriage was shorter than ten years. In Maine, it is rebuttably presumed that spousal support should not be awarded in marriages of less than ten years. Some state statutes restrict the amount of support. In Texas, the support award may not exceed the lesser of $2,500 monthly or 20% of the obligor's gross income. In Louisiana, the support may not exceed one-third of the obligor's net income. In a few states, if the marriage is not a long one, it is presumed that support should not be awarded for a term of more than 50% of the length of the marriage. In some states, there is a maximum term for all spousal support awards, regardless of the length of marriage.

5. Assessing the Impact of the Acceptance of Equitable Distribution and Changes in Spousal Maintenance

During the past fifty years, equitable distribution has become accepted in all common law states. Spousal support is less frequently awarded, and when awarded, it is increasingly common for it to be for a fixed term, rather than for an indefinite period. Have economically vulnerable spouses been helped or hurt by these changes?

Empirical studies during the 1960s through the early 1980s found that many divorcing couples during that period had little property. These commentators argued that, as a result, for many couples, it did not matter whether they had the right to share property accumulated during marriage. Because of this, and the reduction in the frequency of postdivorce spousal support, this presents the Empirical studies during the 1960s through the early 1980s found that many divorcing couples during that period had little property. These commentators argued that, as a result, for many couples, it did not matter whether they had the right to share property accumulated during marriage. Because of this, and the reduction in the frequency of postdivorce spousal support, this presents the issue

of whether vulnerable spouses at divorce are now worse off than before the acceptance of equitable distribution.

One legal change and a societal change may impact this analysis. I pointed out above that it is now accepted in most states that unvested pension rights earned during marriage are marital property. Of those workers who work full time throughout the year, in 2006, 52.7% participated in a retirement plan. Plan participation for married full-time workers was 56.9%. There is a trend to reduce the value of pensions at private employers; in contrast, the pension rights of public employees are increasing. In any event, a pension right can be a very valuable asset.

Empirical researchers who have investigated the pension rights of divorcing spouses decades ago found a significantly lower frequency of pension right ownership than mentioned in the preceding paragraph. It is conceivable that these surveys were conducted before it was accepted that unvested pensions were marital property. If this is true, significantly more divorcing spouses today have a marital pension to divide.

For example, an Australian study in the 1990s found that in 81% of all divorce cases, at least one spouse had earned private pension rights. In this study, the investigators found that, on average, pensions accounted for 25% of the parties' total wealth. Also, in New York, the parties' marital estate now includes the value of a professional degree or license earned during marriage. This can obviously be quite valuable.

In addition, even though the market has dipped recently, housing prices during the past decade still have increased significantly, particularly in coastal urban areas. Prices have more than doubled in Boston, New York, Portland, and Seattle, for example, and tripled in Miami, San Diego, and Los Angeles. So, for those spouses living in urban areas who own a home, the marital estate would at least contain a house with significant equity (unless the parties had borrowed against the equity). Indeed, an article was published in the *New York Times* recently about this topic.

In light of these changes over the past decades, it is possible that a significant number of additional spouses divorcing today have a pension or a house (or in New York, a professional degree or license) of substantial value, compared to parties divorcing thirty years ago. Consequently, the adoption of equitable distribution may be becoming more significant over time, as more spouses have accumulated property of some value during marriage. Even if this is true, it remains unclear whether it is better for a vulnerable spouse today to receive a property settlement and possibly spousal support for a definite term, compared to a somewhat more likely award of indefinite spousal support fifty years ago.

To the extent that one is comparing equitable distribution today with alimony half a century ago, one needs to keep in mind a few things about alimony during that era. First, it was infrequently awarded. In most states, the claimant had to be the "innocent" spouse to receive it. In addition, the recipient could have the alimony terminated if she was found to be guilty of postdivorce misconduct. Finally, obligors frequently did not comply with postdivorce obligations to pay periodic alimony.

Judith G. McMullen, Spousal Support in the 21st Century

29 Wis. J.L. Gender & Soc'y 1, 6–8 (2014)

At any rate, it does not appear that alimony of any kind was ever awarded in the majority of divorces. In the years 1887–1906 approximately 9.3% of divorces included provisions for permanent alimony. From the early 20th century through the 1960s, approximately 25% of divorces involved alimony awards of any kind. The few empirical studies that have been done since the mid twentieth century show that alimony awards in the United States have fallen over time in frequency, amount and duration, at least in the states that were studied. As recently as 1978 (prior to divorce reform), Professor Marsha Garrison studied three sample counties in New York and found that approximately 21% of the divorces involved alimony. Four out of five of those awards were for permanent alimony. However, by 1984, Garrison found that the proportion of cases having alimony awards in those same counties had declined 43%, and the majority of the awards were of limited duration. The decline in alimony awards was even more pronounced two decades later when a study of 2005 Wisconsin divorces by McMullen and Oswald found that 8.6% of the sample cases had alimony awards with an additional 2.6% having "family support" awards (which is a hybrid of spousal and child support); 17% of these were awards of permanent alimony (about 1.5% of the sample overall).

Recent developments in other states seem to portend that even fewer alimony awards will be made in the future, and that those awarded will be for lesser amounts and shorter terms. The goal of the legal system in some states has become to avoid or greatly limit grants of alimony whenever possible, and to reserve awards for extreme circumstances. These reductions have been formalized in some states through statutes such as the one in Texas, which limits who can seek spousal maintenance after divorce. The Texas statute only allows a court to award alimony in marriages of 10 years or more and only if the spouse requesting the support does not have sufficient property to provide for her reasonable needs and is unable to earn sufficient income because of "an incapacitating physical or mental disability."

In 2012, a new law aimed at greatly limiting alimony awards went into effect in Massachusetts. Under the new rules, the duration of alimony awarded in marriages that lasted 20 years or less is limited to a percentage of the length of the marriage. For marriages that endured longer than 20 years, a court may order alimony for an indefinite length of time, except that alimony payments will be suspended, reduced or terminated when the recipient spouse has maintained a common household with another person for at least 3 months. More importantly, general term alimony payments terminate when the paying spouse reaches full retirement age, although the court has discretion to set a different termination date upon showing of good cause documented in written findings entered by the court justifying the deviation.

Prior to the enactment of the Massachusetts reforms, courts there had broad power to order permanent alimony when marriages ended. How often this occurred depends upon whom you believe: advocates for reform argued that "[a]ll alimony was for life. Payers did not have the right to retire;" while critics of the reform argued that lifetime alimony was "rare," happening "so infrequently and in such unusual cases — where the dependent ex-spouse is financially desperate and unable to work — that it doesn't merit

the restructuring of all alimony laws for all purposes." One Massachusetts divorce lawyer stated that she had seen judges award lifetime alimony only a few times over the course of her 16-year career.

Some other states have statutes limiting alimony awards, and several other states have burgeoning reform movements aiming for limits. For example, Utah limits alimony payments to a time period no greater than the length of the marriage. Recent legislation passed in Florida, but subsequently vetoed by the governor, would have eliminated most permanent alimony, capped alimony awards, and made it easier for ex-spouses to lower or end alimony payments when the payer retires. Reform efforts to limit alimony payments are pending in several other states, including New Jersey, Colorado and South Carolina.

Notes and Questions

1. What is Professor Perry's major concern about alimony? Is it addressed in the current New York statute? If so, how? If not, could it be? How? *See generally*, Jill C. Engle, *Promoting the General Welfare: Legal Reform to Lift Women and Children in the United States Out of Poverty*, 16 J. Gender Race & Just. 1 (2013) (noting impact of divorce on women and children and urging nationalization of alimony).

2. What is Professor Oldham's major observation? Is this important in New York? To whom?

3. Professor McMullen provides a useful overview of some recent reforms. Which, if any, do you think should be studied by the New York legislature? Why?

4. How do you think each of these family law scholars would respond to the Law Revision Commission's Final Report, below?

Problem 5-2

Pete and Miranda, from Problem 5-1, are back in court. This time you represent Miranda. Pete is seeking post-divorce maintenance, equitable distribution, and child support. Miranda is willing to pay child support but she is unwilling to pay maintenance. Their major asset is their co-op, which Miranda wants to sell. She tells you that similar co-ops in their building have been sold for $950,000, and that there is a smaller two-bedroom on a lower floor, with a kitchen and bathroom from the 1980s, on the market for $825,000, which she believes they could get for $790,000. Miranda would be willing to let Pete and Bradley, their son, live in the smaller unit until Bradley is 18, when it would be sold. She would also agree to let Pete use the difference between the selling price of the unit they currently own and the purchase price of the smaller unit, as long as she would be reimbursed from Pete's share of the proceeds from the smaller unit, with interest, when it is sold. Pete does not want to move.

What are Miranda's legal arguments? How do the facts support these arguments? What are the weaknesses of her position?

C. The Commission's Final Report

The New York State Law Revision Commission Final Report On Maintenance Awards in Divorce Proceedings May 15, 2013

Executive Summary

New York's current maintenance statutes mirror two approaches to maintenance awards. The temporary maintenance statute requires the application of a formula designed to create consistent and predictable results. The final maintenance statute, based on the application of a series of statutory factors, is designed to promote nuanced treatment of the parties' individualized circumstances.

These two desires, individualized treatment for each marriage on the one hand, and predictability and consistency of awards on the other, are difficult to reconcile because the goals "point the policy makers in different directions. Predictable results follow best from clear, determinate, easily applied rules. Individualized results generally are associated with open-ended standards allowing judges to respond to the infinite variety of individual circumstances that these cases present." Our study was an effort to strike a balance between these two approaches.

We have concluded that this balance can be struck by taking into account the differences between cases with limited assets and income on the one hand, and cases involving substantial assets and income on the other. In the former, the court has fewer options in granting awards and it is less likely that either party is represented by counsel; in the latter, the court has more variables to consider, more options in crafting relief, and both parties are more likely to have counsel.

Thus, the starting point for all parties should be a formula for combined income at or below $136,000, a level that reflects the income of a majority of New Yorkers and which allows individuals with income at or below that level to determine their financial obligations to each other and their children upon divorcing in a reasonably inexpensive and expeditious manner. Where the parties' combined income exceeds $136,000, the court maintains its discretion by applying a set of statutory factors to that excess income. The court also retains discretion when the application of the formula would be unjust or inappropriate given the parties' situation.

* * *

A. Temporary Maintenance Awards under the Domestic Relations Law

The Commission recommends that a mathematical formula be continued in the calculation of a presumptive award of temporary maintenance, that the formula be amended to provide that the formula be applied to the parties' combined adjusted gross income of $136,000, and that the income guideline be geared to biennial adjustment in the statute.

The application of the formula establishes a presumptive showing of need and an ability to pay. If the parties' combined adjusted gross income exceeds $136,000, the Commission recommends that the mathematical formula apply to that portion of the parties' combined income which is at or less than $136,000, and that the court be guided

by a set of statutory factors in considering an additional award based on income that exceeds the guideline amount.

* * *

2. Calculation of an award of post-divorce income

The Commission recommends that a mathematical formula be used to calculate a presumptive award of post-divorce income from one party to the other based on the parties' combined adjusted gross income of $136,000.

In awarding post-divorce income, the court can adjust the presumptive award based on a set of statutory factors if it finds that the presumptive award is unjust or inappropriate based on the circumstances of the parties.

If the parties' combined adjusted gross income exceeds $136,000, the Commission recommends that the mathematical formula apply to that portion of the parties' combined income which is at or less than $136,000, and that the court be guided by a set of factors in considering whether an additional award is justified based on any excess income.

* * *

C. Support Awards under the Family Court Act

* * *

We recommend that the provisions of a revised temporary maintenance statute in the Domestic Relations Law be mirrored in section 412 of the Family Court Act governing spousal support awards.

* * *

The 2010 introduction of a formula to establish a presumptive award of temporary maintenance gave rise to more controversy in New York. Attorneys for middle and low income clients reported that the formula introduced consistency among awards for clients in similar circumstances and resulted in awards in cases where clients would have previously abandoned their claims. On the other hand, attorneys whose clients have substantial assets found themselves involved in expensive litigation seeking relief from the application of the formula. Furthermore, advocates on all sides expressed several concerns about the new statute, among them, the presence of factors irrelevant to a determination of temporary maintenance and the failure of the formula to account for awards for necessities under section 326B(8) of the Domestic Relations Law.

* * *

1. The Law Revision Commission's Concerns

The Commission was interested to learn the relationship, if any, between any award of temporary or final maintenance and the parties' length of marriage, the status of their health, their respective incomes, and the presence of un-emancipated children. The Commission was also interested to see the difference, if any, between awards of temporary maintenance before and after the enactment of chapter 371 of the laws of 2010, and what effect the application of a formula like the one for temporary maintenance would have on final maintenance awards. Finally, the Commission was concerned about the relationship between a lack of final maintenance awards and the impoverishment of a spouse after a divorce.

2. The Responses

No statistically significant conclusions could be derived from the responses to the questionnaire. Our personal review of all 7,302 questionnaires revealed that the responses provided varying degrees of information. A small number of responses provided detailed information about the parties' specific jobs with specific salaries, and specific amounts of any awards made. A greater number provided no information. The vast majority of the responses were incomplete in many particulars. However, the following information can be reported.

A. Length of Marriage

The divorces by length of marriage across the responses were relatively evenly divided among categories of fewer than 5 years, 5–10 years, 11–20 years and greater than 20 years.

* * *

D. Application of a Formula for Final Maintenance Awards

If a formula similar to the temporary maintenance formula was used to calculate final maintenance, it appeared that a majority of cases where no award was actually made would be entitled to a presumptive award. Of 5,932 cases providing some information about the parties' income but reporting no award, the application of the formula would indicate an award in 3,349 cases (56 percent).

* * *

3. Conclusion

Although the data was thoroughly examined, the paucity of information provided in the responses made it difficult to draw conclusions. The one item that seems significant, however, is the fact that 56 percent of cases where no final award was made would have benefitted from an award through the application of the formula.

III. The Law Revision Commission's Recommendations

* * *

Thus, the Commission recommends the continuation of a formula for awards of temporary maintenance, the adoption of a formula for final maintenance or post-divorce income, and the preservation of the court's flexibility to address situations where the parties' income exceeds the formula's income guideline or the presumptive award is unjust or inappropriate given the parties' situation.

* * *

The Commission does not suggest that the formula's methodology be disturbed; however, given both the patterns observed in the collected data about parties' income as well as statistics about the income of the vast majority of New Yorkers, the Commission recommends that the income guideline up to and including $500,000 of the higher income spouse be reduced.

B. Income Guideline of $136,000

* * *

…. A number of considerations influenced the Commission's proposal: a recognition of the diversity of income levels between upstate and downstate, the current income

guideline of the Child Support Standards Act which is based on the parties' combined income, information about New Yorkers' income available from various sources, and a belief that applicable guidelines for maintenance and child support should be consistent with one another to avoid confusion and unnecessary complexity.

* * *

.... The Commission was therefore guided by the income guideline in the Child Support Standards Act— $136,000 adjusted by statute biennially in accordance with the CPI-U, and the approach adopted by the Legislature in setting that guideline — namely to include the vast majority of New Yorkers and leave "only exceptional income cases to potentially be determined outside of the presumptively correct CSSA percentages." The Commission looked at data collected by the New York State Tax and Finance Department which indicated that in 2008, 94.8% of persons filing individual tax returns in New York, including couples filing joint tax returns, reported income of less than $200,000. In the same year, 14.2% of individual filers reported income of between $100,000 and $199,000. The remaining 80.6% reported income of less than $100,000.

* * *

The Commission therefore recommends that duration of any post-divorce income award be based on a consideration of the length of the marriage, the length of time necessary for the party seeking post-divorce income to acquire sufficient education or training to enable that party to find appropriate employment, the normal retirement age of each party as defined by the Internal Revenue Code and the availability of retirement benefits, and any barriers facing the party with regard to obtaining appropriate employment such as child care responsibilities, health, or age. The court must state the basis for the duration of the award in its decision granting the award.

* * *

A person who needs but is not receiving support from his spouse has two legal options: initiate a divorce proceeding and move for temporary section 236 maintenance or, alternatively, bring a support action in Family Court pursuant to section 412. The plaintiff may choose the section 412 route for many understandable reasons, including religious principles, the hope for a reconciliation, or the practical difficulties of obtaining pro-se litigant matrimonial relief (it is far easier and swifter to prosecute a support case in Family Court than a matrimonial case in Supreme Court). The facts and circumstances of the spouse are identical regardless of the forum, the needed relief is identical, but because one statute provides a specific formula while the companion statute provides only a very incomplete, generalized and highly discretionary remedy, the results may be totally different.

We recommend that the provisions of a revised temporary maintenance statute in the Domestic Relations Law be mirrored in ... the Family Court Act....

Mary Kay Kisthardt, Re-Thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance

21 Am. Acad. Matrimonial L. 61, 61–62, 64–65, 72–73, 80–81 (2008)

* * *

.... In 2003 President Sandra Joan Morris appointed a Commission (AAML Commission) to critically review the American Law Institute's Principles of the Law of Family dissolution: analysis and Recommendations (2002) (Principles), to analyze the Principles and to make recommendations consistent with the mission of the Academy.

.... The ALI Commission conducted a review of Chapter 5 of the Principles on Compensatory Payments. The Principles are premised on the theory that, absent extraordinary circumstances, spousal support should be based exclusively on compensation for losses that occurred as a result of the marriage, a proposition that was rejected by the AAML Commission. The AAML Commission also considered extensive feedback from members of the Academy which was gathered through a national survey, a general meeting of the membership and a discussion session that followed an AAML Commission CLE presentation on the issue.

After considering all these sources of information the Commission concluded that there are two significant and related problems associated with the setting of spousal support. The first is a lack of consistency resulting in a perception of unfairness. From this flows the second problem, which is an inability to accurately predict an outcome in any given case. This lack of consistency and predictability undermines confidence in the judicial system and further acts as an impediment to the settlement of cases, because without a reliable method of prediction clients are in a quandary and lawyers can only offer forecasts based on experiential, rather than empirical, backing.

* * *

.... The theory behind child support is obvious: parents have a duty to support their children regardless of marital status and the amounts are set by mandatory guidelines. Spousal support, however, remains the most difficult of the economic issues to resolve because it lacks both the underlying rationale of the other issues as well as any standards by which to predict the amount of the award.

The lack of a coherent rationale undermines the ability to provide consistency in awards. Alimony statutes vary significantly from state to state with some authorizing payments in a wide variety of situations and others restricting it to very narrow circumstances. But in almost all states judges are given a great deal of discretion with the result that these awards are rarely overturned. Because of an inability to come to a consensus regarding the underlying rationale for alimony, legislatures often include a long list of factors for judges to consider. One commentator found over sixty factors mentioned in the fifty states. Unfortunately there are often internal inconsistencies in the factors and no state provides a priority ranking. Judges struggle with how to apply a myriad of factors to reach a fair result. Statutory criteria, with no rules for their application, then result in a "pathological effect on the settlement process by which most divorces are handled."

Without a reliable method of prediction, clients are often uncertain about whether to assume the risk of trial. This situation may present the greatest challenge for women who often do not have the financial resources to fund protracted litigation with an uncertain outcome. A study in Maryland found that courts made very few alimony awards even though a majority of the marriages studied had lasted more than ten years and at the time of the divorce the average income of the husbands was almost double that of the wives. What was striking was the number of cases in which the economically dependent spouse did not seek an award. The authors concluded that this was due in large part to the reluctance to expend money on litigation costs without the likelihood of any beneficial result.

* * *

D. *The ALI Principles*

.... [T]he ALI in its Principles recommends the setting of presumptions or guide lines. The ALI focuses on spousal payments as compensation for economic losses that one of the spouses incurred as a result of the marriage. The ALI guidelines are premised on the assumption that when a marriage is dissolved there are usually losses associated with it such as lost employment opportunities or opportunities to acquire education or training that lead to disparities in post-divorce earning capacities. The ALI takes the position that these losses, to the extent they are reflected in a difference in incomes at the time of dissolution, should be shared by the partners. The Principles assume a loss of earning capacity when one parent has been the primary caregiver of the children. They also make provisions for compensation for losses in short term marriages where sacrifices by one spouse leave that spouse with a lower standard of living than he or she enjoyed prior to the marriage. Finally, under the Principles, compensation could be awarded based on a loss of a return on an investment in human capital (where one spouse has supported the other through school). This would be most important in the vast majority of states that do not recognize enhanced earning capacity or a degree or license as a divisible marital partnership asset. [Ed. Note: Unlike New York; see *O'Brien v. O'Brien*, Chapter 7] In setting the amount and duration, the ALI recommends a formula that is based on a specified percentage of the difference in the spouses' post-divorce income for a period of time that is dependent on the length of the marriage.

E. Guidelines

While the ALI chose to focus on both the substantive rationale for alimony as well as a guideline approach to ensuring some predictability, increasing numbers of jurisdictions have chosen to focus primarily on the prediction problem by turning to mathematical formulas or guidelines. In almost all instances these guidelines are intended to be used as a starting point for discussion and do not constitute a presumption. Most

guide lines are confined to temporary or pendente lite awards and are the result of local, not state-wide adoption.

* * *

The AAML Commission Recommendations

* * *

Amount:

Unless one of the deviation factors listed below applies, a spousal support award should be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income: the alimony amount, so calculated, however, when added to the gross income of the payee shall not result in the recipient receiving in excess of 40% of the combined gross income of the parties.

Length:

Unless one of the deviation factors listed below applies, the duration of the award is arrived at by multiplying the length of the marriage by the following factors: 0–3 years (.3); 3–10 (.5); 10–20 years (.75), over 20 years, permanent alimony.

"Gross Income" is defined by a state's definition of gross income under the child support guidelines, including actual and imputed income.

The spousal support payment is calculated before child support is determined.

This method of spousal support calculation does not apply to cases in which the combined gross income of the parties exceeds $1,000,000 a year.

Deviation factors:

The following circumstances may require an adjustment to the recommended amount or duration:

1) A spouse is the primary caretaker of a dependent minor or a disabled adult child;
2) A spouse has pre-existing court-ordered support obligations;
3) A spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses);
4) A spouse has unusual needs;
5) A spouse's age or health;
6) A spouse has given up a career, a career opportunity or otherwise supported the career of the other spouse;
7) A spouse has received a disproportionate share of the marital estate;
8) There are unusual tax consequences;
9) Other circumstances that make application of these considerations inequitable;
10) The parties have agreed otherwise.

Notes

1. The excerpts above are far from the last word on spousal maintenance. *See, e.g.*, Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. Ill. L. Rev. 319 (2012) (criticizing alimony as the "least coherent family obligation"); Ira Mark Ellman & Sanford L. Braver, *Lay Intuitions About Family Obligations: The Case of Alimony*, 13 Theoretical Inquiries L. 209 (2012); Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 Duke J. Gender L. & Pol'y 41 (2011).

Problem 5-3

Part A. A committee of the New York legislature is holding a public hearing to consider maintenance reform legislation. As a lobbyist, prepare a three- to five-minute presentation to the committee, advocating the position of your organization. Your presentation could be a personal (fictional) testimonial, a presentation of policy arguments, or any other format that you feel would effectively convey the position of your interest group. The following are interest groups that would be eager to be heard on this issue. If your instructor does not assign you, individually or in groups, to represent a particular group, select the group you would like to represent.

Interest Groups

New York Legal Aid Board

Organization for Women (a feminist organization similar to NOW)

Family Law Section of the New York Bar Association

New York Fathers' Rights Advocates

New York Association of Judges and Court Personnel

Part B. As a member of the legislative committee considering maintenance reform legislation, draft a proposal for a new New York maintenance statute. Assume you represent a) an affluent, conservative Long Island district; b) an affluent, liberal district (including Brooklyn); c) a low-income, upstate rural district; and d) a low-income urban district.